United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF AND APPENDIX

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76-1464

To be argued by
DAVID S. GOULD

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1464

UNITED STATES OF AMERICA,
Appellee,

—against—

COSME A. CACERES, LEOPOLD LOZANO,
and JOSE A. LIRIANO,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR THE APPELLEE

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Appellants.

BRIEF FOR THE APPELLEE

Preliminary Statement

Appellants Cosme A. Caceres, Leopold Lozano and Jose A. Liriano appeal from judgments of conviction entered in the United States District Court for the Eastern District of New York (Bramwell, *J.*) after a jury trial. Appellants were all convicted on one count of conspiring to possess and pass counterfeit bills (T. 18, U.S.C. § 371), four counts of passing counterfeit bills (T. 18, U.S.C. §§ 472 and 2) and one count of possessing counterfeit bills (T. 18, U.S.C. § 472). In addition, both Caceres and Liriano were convicted of possessing counterfeit bills found in their wallets.

On Count I, a negotiation charge, Caceres was sentenced to imprisonment for three years, to serve four

months in a jail type institution, with the execution of the remainder of the sentence suspended, and three years probation (T. 18, U.S.C., § 3651). Imposition of sentence on the remaining counts was suspended and Caceres was placed on three years concurrent probation for each count. Appellant Lozano received a sentence of two years on Count I, with all but four months suspended. On the other counts, imposition of sentence was suspended and Lozano was given concurrent three year probationary terms. Appellant Liriano was sentenced on Count I to imprisonment for two years, execution suspended, and placed on three years probation. He was placed on probation for three years on each of the remaining counts with all sentences to run concurrently. It is a special condition of the probation of each appellant that if deported, he not return to the United States or its possessions during the pendency of probation.

On appeal, appellants Lozano and Liriano assert that there was no probable cause for their arrest and that therefore the subsequent statements they made to law enforcement officers should have been suppressed and the counterfeit money found pursuant to a post-arrest search of their car should not have been allowed into evidence. Appellant Caceres asserts that it was plain error for the trial court to have included "natural and probable consequences" language in his otherwise faultless charge. Appellant Caceres also seeks a reversal on the grounds that a Secret Service Agent destroyed notes in the normal course of business after preparing from those notes the statement which Caceres signed.

Statement of Facts

The Government's Direct Case

The evidence at trial showed that on the evening of October 31, 1975, appellants drove through Astoria, Queens, passing counterfeit twenty dollar bills by making small purchases at local stores and receiving change in genuine currency. When appellants were arrested, over $550 in real money was found in their car, stuffed loosely into a brown paper bag on the front seat. Counterfeit bills were found in the ashtray of the car and were also recovered from another paper bag which was thrown from the vehicle at the time of the arrest.[1]

The Halloween shopping spree began sometime before 6:30 p.m. when appellant Caceres entered the "Sip 'N Smoke Shop" in Astoria. Mr. Richard Simmons, a part owner of the store, saw Caceres enter but paid little attention to what he did. After Caceres left, Simmons' partner came to him holding a twenty dollar bill which Caceres had just given him for a purchase (D 27-28). Simmons, an experienced taxicab driver, could see immediately that the bill was counterfeit. After returning

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[1] Since the transcript was not consecutively paginated, this brief will use the following key to identify pages of the transcript:

A = June 3, 1976 (Suppression hearing)
B = June 3, 1976 (Suppression hearing—testimony of Agent Dario Marquez)
C = June 7, 1976 (Court decision on suppression motion)
D = June 7, 1976 (Trial)
E = June 8, 1976 (Trial)
F = June 9, 1976 (Trial)
G = June 10, 1976 (Trial)
H = June 14, 1976 (Trial)
I = June 15, 1976 (Trial)

the bill to his partner, he went to his car and drove off to try to find Caceres (D 29).

A few blocks from his store, Simmons saw Caceres in "Leo-Pete's" grocery store (D 30). He also noticed a green Chrysler containing two other male Hispanics parked near the curb with its lights off. Simmons saw Caceres puchase something in the grocery store and then dash out, looking around furtively as he approached and entered the Chrysler. (D 31-32) The car's lights then went on and it drove off, snaking its way down the street. Simmons followed the car to "La Pasticceria LaTorre", a bakery a few blocks away. And as he followed the car, he jotted down the vehicle's license plate number (D 33).

After seeing Caceres enter the bakery, Simmons left the scene to get help and a few blocks away he found Police Officers Thomas Gaffney and James Hughes. Simmons told them that three male Hispanics were passing counterfeit money and told the officers what he had seen (D 35-36).

Officer Gaffney followed Simmons to the bakery shop where Caceres and the Chrysler had last been seen (D 37). Inside the shop, Josephine Polizzi, the cashier gave the police and later identified in court a counterfeit twenty dollar bill bearing the serial number 67681889 (E 29). The bill had just been given to her as payment for some cookies (E 23).

After confirming with the manager of a local bank that the bill was in fact counterfeit, Gaffney obtained from Simmons a description and the license plate number of the Chrysler in which Caceres and the other two male Hispanics had been riding (E 30). Gaffney and Hughes then continued down Broadway in search of the Chrysler and its three occupants. After going about six blocks, they spotted the vehicle (E 31).

Approaching the parked car, the officers demanded that the driver, appellant Liriano, show his license and registration (E 32). As he was asking Liriano to produce the license, Officer Gaffney noticed on the front seat between Liriano and appellant Lozano, a brown paper bag with money literally "pouring" out of the top (E 40). At this point Gaffney ordered Caceres, Liriano and Lozano out of the car. A crowd started to form and as Caceres exited from the back seat of the car, Gaffney heard a bystander yell that some "kids" were running off with a brown paper bag which had been thrown out of the car. While Hughes secured the prisoners, Gaffney recovered the brown paper bag. Inside he found six counterfeit twenty dollar bills whose serial numbers matched exactly the serial numbers of bogus bills identified by the store owners passed earlier in the evening by Caceres (E 32, 35, A 14-15). The bag seen inside the Chrysler was discovered to contain more than $550.00 in genuine currency in small denominations, (ones, fives and tens) obviously the proceeds from the shopping spree (E 44).[2]

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[2] Peter Kardasis, the part owner of the "Leo-Pete" grocery store identified two counterfeit twenty dollar bills, bearing the same serial number as the bills found in appellants' car (67681889). He stated the bills were passed in his store shortly after 6:30 p.m. on October 31, 1975 (E 13-18). Eva Walken, the manager of Walken's bakery identified a counterfeit twenty dollar bill, serial number 67681889, which had been passed in her store shortly before 7:00 p.m. on the 31st. She also identified a Walken's bakery box found in appellants' car at the time of their arrest (E 82-86). All of the stores were located near each other in Astoria, Queens.

A subsequent inventory of the car revealed that strewn haphazardly about the car were; two separate bags of cookies, several cantaloupes, a box of candy, bread and rolls, orange juice, a dead fish, a box of soap, several apples, a box of Shake 'N Bake, two cartons of cigarettes, and a bag of cheese kisses (F 26-27).

At the local precinct, appellants were searched. In Caceres' wallet the officers found a counterfeit twenty dollar bill bearing a serial number identical to those on bills which had been passed earlier in the evening (E 52). A similar examination of appellant Lozano's wallet revealed a counterfeit fifty dollar bill whose several numbers matched those of another counterfeit fifty dollar bill found in the ashtray in the car in which appellants were arrested (E 48, 52).

After being given his *Miranda* warning, Caceres told the police that he had found the bogus money in the back seat of the taxicab which he drove. Although he did not know at first that the money was counterfeit, Caceres said, a friend later did tell him that the bills were "bad" (E 54, 56).

Later that evening, appellants Lozano and Liriano were questioned by Secret Service Agent Dario Marquez, a Spanish speaking agent. In a signed statement Lozano admitted that the bills were counterfeit and he confessed to having passed three or four of them that evening, including one at Walken's bakery. (See Government's Appendix).

Agent Marquez also questioned appellant Liriano, who signed a waiver of rights form written in Spanish. At first Liriano, who like Lozano, signed a waiver of rights form written in Spanish, denied his involvement in the crime. However, after Marquez repeatedly told him he did not believe him and that he should not talk at all if he was going to lie, Liriano changed his story. He claimed that he only found out about the money being Astoria from the Bronx earlier that evening. Liriano admitted driving the car but claimed that the counterfeit counterfeit when Caceres showed him the money and told him it was counterfeit as they were driving to

fifty dollar bill found on his person was not payment for his driving but was, rather, a "souvenir" he had requested from Caceres. Throughout the interview, Liriano insisted he had done nothing wrong because he was only driving the car even though he admitted he saw Caceres and Lozano going in and out of a number of stores to cash these bills. There was no written statement from Liriano since he told Agent Marquez he did not wish to sign one (E 134-137).

Agent Charles Quinn interviewed appellant Caceres. Caceres was given his *Miranda* warning and signed an advice of rights form. Caceres admitted he knew the money was counterfeit but stuck to his earlier story to the police that he had found the money in the back seat of his taxicab. He then gave the details of his passing the counterfeit money that evening (See Government's Appendix). At the conclusion of the interview, Caceres signed a written statement, witnessed by Agents Quinn and Marquez (E 90-104).

The Defense Case

Each appellant took the stand and testified in his own behalf. In substance, all three appellants denied knowing that the counterfeit money which had been passed, found in their possession, found in the Chrysler and found in the paper bag thrown from the car was counterfeit. They said that the paper bag with the counterfeit money had never been in the car and they denied that there were any items strewn about the car at the time of the arrest (See F 86, 107-108, 119 [Caceres]; G 51, 53, 54 [Liriano]; F 159, 161 [Lozano]). In addition, Lozano (F 130), Liriano (G 53), and Caceres (F 86, 97-101), each denied that they told any Secret Service Agent that they knew the bills were counterfeit.

Government's Rebuttal Case

Agent Smith retook the stand for the Government's rebuttal case. Appellants had denied that certain items had been in the car at the time of their arrest, but Agent Smith vehemently denied planting, *inter alia*, canteloupes, a dead red fish, a box of Shake 'N Bake and black lace panties in appellants' car. He reaffirmed that the items were strewn about the car in a haphazard manner (G 56, 58). Agent Smith denied any threats had been made to obtain statements from appellants. Agent Smith also contradicted other testimony given by the appellants when they testified. (See Rebuttal testimony of Agent Phillip Smith G 56-63).

ARGUMENT

POINT I

There Was Probable Cause For The Arrest Of Caceres, Lozano and Liriano.

Appellants Lozano and Liriano contend that the police lacked probable cause to arrest them and Caceres. Hence, they argue, the district court erred in denying their motion to suppress their post-arrest statements and evidence seized from them and from the car in which they were riding at the time of their arrest. *Wong Sun* v. *United States*, 373 U.S. 484, (1963). We disagree. We submit that there was overwhelming evidence at the suppression hearing to support the court's conclusion that there was "more than ample" probable cause underlying the challenged arrests. (See Appellant Caceres' Appendix D).

Officer Gaffney was at the scene of an accident in Astoria, Queens between about 7:00 and 7:30 p.m. on the

evening of October 31, 1975, when Richard Simmons approached him and his partner, Officer Hughes (A 10-11). Simmons informed Gaffney that three male Hispanics were passing counterfeit bills on Broadway, a short distance away. He specifically told the officers that the men had already passed a counterfeit twenty dollar bill in his store that evening and that they had then stopped at several other stores and were now at a nearby bakery store (A 10, 11, 29, 60, 69, 70).

Following Simmons to the bakery store, "LaPasticceria LaTorre," at 3209 Broadway, Officer Hughes went into the store and asked the lady behind the counter if she had received a twenty dollar bill. She said she had and handed Officer Gaffney a twenty dollar bill (A 12). Officer Gaffney took the bill across the street to a bank, where the bank manager examined the bill and informed Gaffney that it was counterfeit (A 12, 30).

At this point, Simmons informed the police officers that the three male Hispanics were driving a green Chrysler, with the license plate 902 XLL. Simmons also gave the officers his name and address (A 13).

After cruising down Broadway for a short time, Gaffney and Hughes spotted the green Chrysler, license plate 902 XLL, parked only six blocks from the bakery where the officers had just retrieved the counterfeit bill (A 32). Gaffney and Hughes then approached the car and, upon seeing that it contained three male Hispanics, demanded that the driver produce his license and registration (A 13, 33). Simultaneously, Gaffney observed on the front seat, beside appellant Liriano, the brown paper bag with genuine currency "pouring" out of it (E 40). At this point, appellants were all placed under arrest. (A 10-13, 30-33, 44, 46, 54).

This Court has long adhered to the standard that probable cause to arrest exists where "there is evidence sufficient to warrant a prudent man in believing that [appellants] had committed or were commiting a crime." *United States ex rel. LaBelle* v. *LaVallee*, 517 F.2d 750, 753 (2d Cir. 1975), *cert. denied*, 423 U.S. 1062 (1976), *quoting*, *Beck* v. *Ohio*, 379 U.S. 89, 91 (1964). We fail to see how it can be argued that the evidence here did not meet this probable cause standard.

In the first place, it is to be noted that Simmons, the man providing the initial information concerning appellants, was "an identified bystander with no apparent motive to falsify." *United States* v. *Rollins*, 522 F.2d 160, 164 (2d Cir. 1975), *cert denied*, 424 U.S. 918 (1976). Therefore, there was not as great a need for corroboration as there would have been if Simmons had been an informant or an unidentified citizen who gave information and then faded into the night. *Cf. Aguilar* v. *Texas*, 378 U.S. 108 (1964). Nevertheless, the police officers prudently took several steps to corroborate the information which Simmons had given them.

First, they checked Simmons' statement that the men passing counterfeit twenty dollar bills had been in La-Pasticceria LaTorre bakery store. After receiving the twenty dollar bill from the cashier in that bakery, Officer Gaffney corroborated the fact that the bill was counterfeit by soliciting the opinion of a bank manager across the street.

The officers then corroborated the fact that the bills had been passed recently by locating the car which matched the exact description given them by Simmons (including the license plate number). The car, with appellants inside, was then located a mere six blocks from the stores where Simmons had reported seeing appellants. When the officers saw that the car contained three male His-

panics as Simmons had reported, the officers approached the car to effect an arrest. The fact that Officer Gaffney viewed a large amount of loose money in a brown bag on the front seat as he approached the car only put the crowning touch on a mound of evidence which the officers had already gathered and corroborated. Indeed, the officers had gathered more than enough information to form a "substantial basis" for crediting the statements made to them by Simmons. *Jones* v. *United States*, 362 U.S. 257, 271 (1960); *United States* v. *Harris*, 403 U.S. 573, 580-581 (1971); *United States* v. *Sultan*, 463 F.2d 1066, 1069 (2d Cir. 1972).

In sum, we submit that Gaffney and Hughes had more than enough probable cause to arrest appellants. The motion to suppress was properly denied.

POINT II

Appellant Caceres Is Not Entitled To Have His Conviction Reversed Because Agent Quinn Destroyed His Notes Pertaining To Caceres' Signed, Sworn Statement.

Following his arrest, appellant Caceres was interviewed by Secret Service Agent Charles Quinn. As the interview was taking place, Agent Quinn took brief notes. He then wrote up the statement in block letters so that Caceres, a junior college student who spoke English fluently, could read it more easily (A 90). Quinn then read the statement out loud to Caceres. Caceres then read and signed the statement as well as initialing it in several places. (See A 79-87, 90). Sometime after the statement was taken, Agent Quinn destroyed his original notes, as was his normal practice (E 98-99).[3]

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[3] The signing of the statement was also witnessed by Agent Marquez (E. 121).

Starting from these totally unexceptional facts, appellant Caceres argues that Agent Quinn's destruction of his notes was, "in the context of Caceres' challenge to the accuracy and completeness of the statement as it was introduced at trial," reversible error (Brief for appellant Caceres, page 12). The claim is wholly without merit.

In the first place, the remedy recognized by the Ninth Circuit in *United States* v. *Harris*, 543 F.2d 1247, 1249 (9th Cir. 1976), a case relied upon by Caceres, for a wrongful destruction of a witness' notes is to strike his testimony after a proper motion has been made at trial. There was no motion by the defense here to strike Agent Quinn's testimony, even though the existence of the statement and the circumstances under which it was taken were known before the commencement of the trial.[4] Nor did Caceres request a hearing to determine the accuracy of the statement which he signed. *See United States* v. *Thomas*, 282 F. 191, 194 (2d Cir. 1960); see also *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966).[5]

Indeed, it is important to note that what Caceras attacked as untrue was his own written signed statement, not the agent's report. Since the signed statement, unlike a later investigative report, was written contemporaneously with the notes, there would be no motive to falsify the statement in order to make it fit more neatly into a

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[4] Agent Quinn testified at a pre-trial suppression hearing.

[5] Indeed, even under Ninth Circuit law, had a proper motion to strike been made and denied at trial, the error would not be considered *per se* harmful. See *United States* v. *Harris*, *supra*, 543 F.2d 1247, 1253. Yet appellant here *sub silentio* requests a *per se* rule by requesting an automatic reversal of the case merely because one agent destroyed his notes in the normal course of business.

post-arrest investigative theory. Agent Quinn wrote up the statement immediately from the notes and Caceres signed it. Indeed, Caceres' claim is seriously undercut by the fact that he himself signed and initialed the statement which he claims was inaccurate.

It should also be noted that this Court has not taken the position that such rough notes must be preserved. While one case in this circuit indicated that the better practice would be to preserve the notes (see *United States* v. *Thomas*, 282 F.2d 191, 194 (2d Cir. 1960)), the majority of cases in this circuit which discuss the matter have indicated that the practice followed by Agent Quinn is not objectionable. *United States* v. *Terrell*, 474 F.2d 872, 877 (2d Cir. 1973); *United States* v. *Covello*, 410 F.2d 536, 545 (2d Cir.), *cert. denied*, 396 U.S. 879 (1969); *United States* v. *Comulada*, 340 F.2d 449, 450-451 (2d Cir.), *cert. denied*, 380 U.S. 978 (1965); *United States* v. *Greco*, 298 F.2d 247, 249-250 (2d Cir.), *cert. denied*, 369 U.S. 820 (1962).

POINT III

There Was More Than Sufficient Evidence Upon Which The Jury Could Find Appellant Liriano Guilty Beyond A Reasonable Doubt.

Appellant Liriano claims that the evidence against him was insufficient to convict.[6] Specifically, Liriano claims that all the Government proved was that he was present while the criminal activity engaged in by Caceres and Lozano was occurring. He contends that the Government merely proved that he drove the car and was in possession of a counterfeit fifty dollar bill at the time of his arrest. (Appellant Liriano's Brief, page 13). The claim is without merit, for we submit that there was more than enough evidence to show that Liriano's case was not just one of "mere presence."

Initially, it should be noted that Liriano did not merely drive some friends from one location to another. The evidence showed that the Chrysler was driven from store to store within a narrow area, with small, seemingly random, purchases being made at these stores. Indeed, upon arrest numerous items were found strewn about the car.

In addition, Officer Gaffney found over $550 in small bills next to Liriano on the front seat of the car:

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[6] As noted above (Preliminary Statement, *supra*) Liriano was convicted of four counts of aiding and abetting the passing of counterfeit notes at various stores (Counts I-IV), one count of possessing the counterfeit notes in the brown paper bag dropped out of the car at the time of arrest (Count V), one count of possessing the counterfeit fifty dollar bill found in his wallet after arrest (Count VII), and one count of conspiracy to possess and distribute a quantity of counterfeit bills (Count VIII).

> "It was sitting on the seat and the money was like pouring out of the bag. Like they were just throwing money into the bag." (E 40)

A reasonable man could have well found that this genuine currency (all denominations being smaller than twenty dollar bills) found next to Liriano was the change from numerous successful purchases made with counterfeit twenty dollar bills. This conclusion would be bolstered by the fact that the genuine currency was found in a separate bag from the counterfeit currency which was jettisoned from the car upon appellants' arrest (E 35, 40).

Additionally, Mr. Simmons testified that he followed the car appellant was driving and that it was being driven in a strange manner. The car would stop, the lights would go out and a person would jump out and run into a store, after which the person would reenter the car and the vehicle would start up again. This strange behavior continued all during the time Simmons followed the car (D 29-35, 64, 67).

In addition to the foregoing circumstantial evidence, the Government also placed before the jury statements made by Liriano, after his arrest, to Agent Marquez.

Liriano admitted to Marquez that he knew the money was counterfeit. In fact, the three appellants discussed the counterfeit money in the car while Liriano drove his compatriots on their "buying spree" (E 136, 161). Liriano also admitted he knew the fifty dollar bill in his wallet was counterfeit but claimed Caceres had given it to him as a souvenir (E 136). What Liriano emphasized time and again to Agent Marquez was that he [Liriano] never actually passed any of those bills (E 118, 136, 160). Appellant obviously was under the mistaken belief that

if he did not actually pass the bills, he could not be guilty of any crime. Hence, his post-arrest attempt to fashion a believable exculpatory statement actually became a damning admission at trial.

Appellant also fails to point out that he testified at the trial, and his unbelievable and, at times, incredible testimony alone could have led a reasonable man to conclude Liriano was guilty of the crimes charged.

Liriano testified, contrary to his statement to Agent Marquez, that he had borrowed the fifty dollar bill found in his wallet from Carceres (G 24). On cross examination, though, he admitted he had his own money at the time he allegedly borrowed the fifty dollars from Caceres (G 38). He also testified on cross-examination that appellants were arrested immediately after he (Liriano) went to buy some liquor, but he had testified earlier that he did more shopping after buying the liquor. (Compare, e.g. G 50 with G 46). Thus, the extra shopping had to have taken place while the appellants were handcuffed in custody of the police. This was just a portion of Liriano's testimony which the Government contends a reasonable man could have found to be incredible.

In addition to inherently incredible testimony, Liriano directly attacked the veracity of several Government witnesses. He stated that he never saw Officer Gaffney retrieve the bag of counterfeit money which was thrown from the car even though Gaffney was never out of Liriano's sight (G 51, 54). Liriano also denied making the incriminating statements about which Agent Marquez testified (53). Perhaps most importantly, Liriano testified there were not about twenty different objects strewn randomly about the car as Agent Smith testified (G 49). Yet, Agent Smith found the items in the car, and in the Government's rebuttal case, he vehemently

denied that he had planted such items as canteloupes, a box of Shake n' Bake, a pair of black lace panties and a dead red fish in the car Liriano was driving (G 56-57). Needless to say, a reasonable person could have determined these crucial questions of credibility in the Government's favor.

In short, viewing all the evidence in the light most favorable to the Government, *Glasser* v. *United States*, 315 U.S. 60 (1942), it can hardly be argued that the Government's evidence against Liriano did not meet the standard for sufficiency annunciated in *United States* v. *Taylor*, 464 F.2d 240 (2d Cir. 1972), *quoting with approval*, *Curley* v. *United States*, 160 F.2d 229, 232-233 (D.C. Cir.), *cert. denied*, 331 U.S. 837 (1947); that a verdict should not be overturned for insufficient evidence if "upon the giving of full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude beyond a reasonable doubt."

The case of *United States* v. *Berkley*, 288 F.2d 713 (6th Cir.), *cert. denied*, 368 U.S. 822 (1961), cited by appellant Liriano, is a case where the defendant merely passed a counterfeit bill and was present when a friend made a purchase with a counterfeit bill. There was none of the repeated activity found in the case at bar, nor the mountain of incriminating circumstantial evidence (nor does it appear that the defendant in *Berkley* testified or made damaging admissions). In *Berkley*, the court concluded that "there was no evidence that Verzi had anything to do with those bills." (*Id.* at 715). In the instant case, by his own admissions, Liriano did everything but pass the bills himself.

Appellant also relies on the case of *United States* v. *Tijerina*, 446 F.2d 675 (10th Cir. 1971). In that case,

the defendant drove a car while a co-defendant jumped out and burned some Government signs. His conviction for aiding and abetting in those crimes was affirmed by the court. In the instant case, appellant not only drove the car, but he was found in personal and joint possession of numerous counterfeit bills. He also admitted knowing of the scheme beforehand, and a jury could well have concluded from all of his behavior and from his incredible testimony that he was a prime mover of the scheme to pass counterfeit bills from its inception.

In short, the evidence showed that Liriano drove the car in a halting and suspicious manner as appellants snaked their way through Astoria passing counterfeit bills. Appellant Liriano was arrested in a car containing a bag full of casually placed genuine currency, a separate bag containing counterfeit money, counterfeit bills in the ashtray, and a seemingly random array of cheap items strewn carelessly about the car. He had no rational explanation for a counterfeit fifty dollar bill found in his wallet. He made damning post-arrest admissions about his knowledge of, and participation in, the scheme. He testified in his own behalf to an inherently incredible story and then directly challenged the credibility of several Government witnesses. After the jury viewed all of this evidence, it is difficult to discern how one could deny that a reasonable man could find appellant guilty beyond a reasonable doubt of the crimes charged.

POINT IV

The Court's Charge On Knowledge And Intent Did Not Constitute Reversible Error.

In charging the jury on the question of knowledge and intent, the court gave the following instructions:

> Participation is willful if done voluntarily and intentionally and with the specific intent to do something the law forbids or with the specific intent to fail to do something the law requires to be done, that is to say, with bad purpose either to disobey or to disregard the law.
>
> Aid and abet defined. In order to aid and abet another to commit a crime it is necessary that the accused willfully associate himself in some way with the criminal venture and willfully participate in it as he would in something he wishes to bring about, that is to say, that he willfully seek by some act or omission of his to make the criminal venture succeed. Appellant Caceres' Appendix C at 124.
>
> * * * * *
>
> An act or omission is willfully done if done voluntarily and intentionally and with the specific intent to do something the law forbids or with the specific intent to fail to do something the law requires to be done, that is to say, with bad purpose either to disobey or disregard the law. Appellant Caceres' Appendix C at 124.
>
> * * * * *
>
> An act or a failure to act is willfully done if done voluntarily and intentionally and with the specific intent to do something the law forbids or with the specific intent to fail to do something

the law requires to be done, that is to say, with bad purpose either to disobey or to disregard the law.

Mere presence not sufficient. Mere presence at the scene of the crime and knowledge that a crime is being committed are not sufficient to establish that the defendant aided and abetted the crime unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator. Appellant Caceres' Appendix C at 125-126.

* * * * *

Participation is willful if done voluntarily and intentionally and with specific intent to do something the law forbids or with the specific intent to fail to do something the law requires to be done; that is to say, with a bad purpose, either to disobey or to disregard the law. Appellant Caceres' Appendix C at 130.

* * * * *

An act or omission is willfully done if done voluntarily and intentionally and with the specific intent to do something the law forbids or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law. Appellant Caceres' Appendix C at 131.

* * * * *

An act or failure to act is willfully done if done voluntarily and intentionally and with the specific intent to do something the law forbids or with the specific intent to fail to do something the law requires to be done: that is to say, with bad purpose, either to disobey or to disregard the law. Appellant Caceres' Appendix C at 132.

* * * * *

To act or participate willfully means to act or participate voluntarily and intentionally and with specific intent to do something the law forbids or with specific intent to fail to do so something the law requires to be done; that is to say to act or participate with a bad purpose either to disobey or to disregard the law. Appellant Carceres' Appendix C at 140.

* * * * *

An act is done knowingly if it is done voluntarily and intentionally and not because of misunderstanding and accident or other innocent reasons. Whether something is done knowingly involves a state of mind, but a state of mind, like other facts, can be determined from the evidence and from inferences from the evidence. Appellant Caceres' Appendix C at 143.

* * * * *

Knowingly. An act is done knowingly if done voluntarily and intentionally and not because of mistake or accident or other innocent reason. The purpose of adding the word "knowingly" was to insure that no one would be convicted for an act done because of mistake or accident or other innocent reason. Appellant Caceres' Appendix at 148.

* * * * *

Definition of Specific Intent. This is applicable to all offenses charged in the indictment. The crimes charged in this case are serious crimes which require proof of specific intent before a defendant can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act.

To establish specific intent, the government must prove that a defendant knowingly did an

act which the law forbids, purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.

Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind, but you may infer the defendants' intent from the surrounding circumstances. You may consider any statement made and act done or omitted by a defendant and all other facts and circumstances in evidence which indicate his state of mind.

It is ordinarily reasonable to infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. Appellant Caceres' Appendix C at 150-151.

* * * * *

Proof of knowledge and intent knowledge and intent exist in the mind. Since it is not possible to look into a man's mind to see what went on, the only way you have for arriving at a decision in these questions is for you to take into consideration all the facts and circumstances shown by the evidence, including the exhibits, and to determine from all such facts and circumstances whether the requisite knowledge and intent were present at the time in question.

Direct proof is unnecessary; knowledge and intent may be inferred from all the surrounding circumstances. As far as intent is concerned, you are instructed that a person is presumed to intend the natural and probable or ordinary consequences of his acts. You must find beyond a reasonable doubt from all the evidence that the defendants knew at the time that they possessed or uttered the counterfeited money that the bills were in fact

counterfeit. Appellant Caceres's Appendix C at 154-155.

Appellants claim that the above instructions constitute reversible error because on two occasions the court stated that it is "ordinarily reasonable to infer that a person intends the natural and probable consequences of his acts." We disagree. When the charge is viewed in its entirety, as it must be, *Cupp* v. *Naughton*, 414 U.S. 141, 146-147 (1973); *United States* v. *Guillette*, — F.2d —, Slip op. 6099, 6108 (2d Cir., December 20, 1976), it is clear that the jury was properly instructed on knowledge and intent.

To begin with, the "natural and probable consequences" language, which has been disapproved by this court, *United States* v. *Robinson*, — F.d 2d —, Slip op. 445 (2d Cir., November 10, 1976), is only found twice in a charge in which no less than thirteen times the court instructed the jury on knowledge and intent. And when it did appear, not one of the three defense lawyers objected to the easily correctable phraseology.[1]

Specifically, the court properly charged that an act is only done knowingly if it is done "voluntarily and intentionally and not because of misunderstanding or accident or other innocent reasons". (Appellant Caceres' Appendix C at 143). The court also told the jury several times that a person's knowledge and intent could be inferred from his actions, by circumstantial evidence (*See, e.g.*, Appellant Caceres' Appendix C 150, 151, 154), but that in any event the Government had to prove that the defendant "knowingly did an act which the law forbids, purposely intending to violate the law". (Appellant Caceres' Appendix C at 150).

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[1] In *United States* v. *Barash*, 365 F.2d 395, 402 n.9. (2d Cir. 1966), cited by appellant, an objection to the charge was made at trial.

Most importantly, immediately after the second time the court gave its "natural and probable consequences" charge, the judge added:

> You must find beyond a reasonable doubt from all the evidence that the defendants knew at the time that they possessed or uttered the counterfeited money that the bills were in fact counterfeit. (Appellant Caceres' Appendix C at 154-155).

Hence, there could be no thought by the jury that the mere passing of the counterfeit bills constituted a crime.

In sum, then, the charge, as a whole, clearly worked to eliminate any error which the "natural and probable consequences" language may have caused. This fact distinguishes the case from both *United States* v. *Barash*, 365 F.2d 395 (2d Cir. 1966), and *United States* v. *Robinson, supra*, — F.2d —, Slip op. 445.

In *Barash*, the court reversed the conviction precisely because, unlike here, the remainder of the charge exacerbated rather than assuaged the harmful effects of the erroneous portion 365 F.2d at 403. Similarly, in *Robinson*, the harm was amplified because, there, the instructions "consisted solely of the natural and probable consequence charge. . . ." Slip op. at 454. Thus, unlike both *Barash* and *Robinson*, there was not present here the danger that the jury would be led by erroneous instructions to find the defendant guilty simply because he performed a specific act, "without regard to the totality of the circumstances." *Cohen* v. *United States*, 378 F.2d 751, 755 (9th Cir.), *cert. denied*, 389 U.S. 897 (1967). Here, the overwhelming portion of the court's charge on knowledge and intent was correct.

Equally important is the fact that both the *Barash* and *Robinson* charges included a second prong of the "natural and probable consequences" language which appeared to

shift the burden of proof on the issue of knowledge and intent to the defendent. In *Barash*, the court charged "natural and probable consequences" and then added:

> "So unless the contrary appears from the evidence, you may draw an inference that the defendant intended the natural and probable consequences which one standing in his circumstances and possessing his knowledge should reasonably have expected from any of his acts which he knowingly did." 365 F.2d at 402, *see also United States* v. *Robinson*, *supra*, Slip op. at 451.

In *Robinson* the court emphasized that the natural and probable consequences charge is most harmful when it contains the phrase "unless the contrary appears from the evidence. . . ." *United States* v. *Robinson*, *supra*, Slip op. at 453.

In the charge in this case there was no "unless the contrary appears from the evidence" language to shift the burden of proof to the defendant. This is important for in *United States* v. *Erb*, — F.2d —, Slip op. 49 (2d Cir., October 1, 1976), where the court did employ the "natural and probable consequences" phrase, there was no additional language shifting the burden of proof to the defendant. Accordingly, the *Erb* court affirmed the judgment of conviction. Here, as in *Erb*, the burden of proof was not placed on appellants. The natural and probable consequences language was isolated in an otherwise totally correct charge. The error was harmless.[8]

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[8] The summations of all the attorneys in the case would also have ameliorated any adverse effect of the offending portions of the charge. The principal issue argued by all of the attorneys was whether the appellants knew the money was counterfeit. Given the fact that all attorneys willingly joined issue over the question of knowledge, it is difficult to believe that the jury would somehow think that the mere passing of the money constituted the crime.

CONCLUSION

The judgments of conviction should be affirmed.

Dated: Brooklyn, New York
February 7, 1977.

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

ALVIN A. SCHALL,
DAVID S. GOULD,
Assistant United States Attorneys,
Of Counsel.

COUNT SIX

APPENDIX

★ U. S. Government Printing Office 1976—714-018-AENY-056

AFFIDAVIT

United States of America — File No. ____________

[illegible] District of New York

I [illegible] stated that I have been advised by SA [illegible] United States Secret Service, that under the provisions of the Constitution I have certain rights: The absolute right to remain silent, and that anything I say can be used against me in court of law or any other proceedings; that I have the right to consult with an attorney before answering any questions or making any statements; and that if I cannot afford an attorney and want one, that one can be appointed for me before I say anything; and if I decide to make any statements now, without an attorney present, I have the right to stop the questioning at any time.

Knowing and understanding these rights I hereby make the following statement:

I AM EMPLOYED AS A GYPSY CAB DRIVER. ABOUT THREE [illegible] AGO AFTER I HAD DROPPED OFF A CUSTOMER, I FOUND AN ENVELOPE IN THE BACK SEAT OF MY CAR WHICH THE [illegible] APPARENTLY LEFT THERE. I OPENED THE ENVELOPE [illegible] THAT IT CONTAINED $560 ([illegible] BILL, [illegible] I TOOK THE ENVELOPE HOME AND LEFT IT THERE [illegible] MONTHS. IN THE MEANTIME, MY 1972 PLYMOUTH [illegible] AND I NEEDED MONEY TO REPAIR IT. I DECIDED [illegible] THE MONEY I FOUND IN THE ENVELOPE. IN THE [illegible] OF [illegible] 75 I WENT TO A GROCERY STORE AND TRIED [illegible] MAKE A PURCHASE USING ONE OF THE $20 BILLS. THE STORE EMPLOYEE TOLD ME THE $20 BILL WAS [illegible] REFUSED TO ACCEPT IT. I THEN WENT TO A DEPARTMENT [illegible] ALSO IN QUEENS WHERE I AGAIN TRIED TO MAKE A PURCHASE WITH ONE OF THE $20 BILLS AND [illegible] TOLD THAT THE MONEY WAS NO GOOD AND THE [illegible] EMPLOYEE REFUSED TO ACCEPT IT. I WENT [illegible]

I have read the foregoing statement consisting of ____ pages. I fully understand this statement and it is true and correct to the best of my knowledge. I have made the corrections shown.

I made this statement freely and voluntarily, without any threats, rewards or promises or immunity in return for it.

Subscribed and sworn to before me this day ____________, 19___ at ______________________

____
Signature

____
Title

C.D. STORE IN THE SAME AREA AND TRIED TO MAKE A SMALL PURCHASE. A STORE EMPLOYEE PUT THE $20 I GAVE HIM UNDER A PURPLE LIGHT "COUNTERFEIT DETECTOR" AND TOLD ME THAT ALTHOUGH THE MACHINE INDICATED THE BILL WAS O.K., HE DID NOT BELIEVE THAT IT WAS AND HE REFUSED TO ACCEPT IT. AFTER THIS, I RETURNED TO MY HOME WHERE I MET LEOPOLDO LOZANO AND JOSE LIRIANO, FRIENDS OF MINE. I TOLD THEM ABOUT THE MONEY, HOW I GOT IT AND HOW I HAD BEEN TOLD IT WAS BAD. I TOLD THEM I WANTED TO GET RID OF THE MONEY AND I ASKED THEM TO HELP ME. I TOLD THEM THAT IF THEY HELPED ME PASS THE MONEY WE WOULD SPLIT THE PROCEEDS EVENLY BETWEEN LOZANO AND LIRIANO AGREED AND TOGETHER WE DROVE AROUND QUEENS FOR SEVERAL HOURS PASSING THE COUNTERFEIT MONEY. ALTOGETHER WE PASSED APPROX 20 OF THE COUNTERFEIT $20 BILLS. JOSE TOOK ONE $20 BILL TO KEEP FOR HIMSELF. LOZANO AND I ACTUALLY PASSED THE COUNTERFEIT WHILE JOSE DROVE THE CAR (MY WIFE'S CHRYSLER). LOZANO AND I PASSED ABOUT 10 $20 BILLS EACH AT VARIOUS PLACES INCLUDING BAKERIES, BODEGAS AND A BOTANICA (LEOPOLDO PASSED THE $20 BILL AT THE BOTANICA). WE WERE DISPOSING THE COUNTERFEIT AROUND IN THE CITY WHEN WE RAN OUT OF GAS. WE MADE ONLY SMALL PURCHASES EACH STOP AND PUT THE REAL MONEY WE GOT IN CHANGE IN ANOTHER PART OF MY WALLET IN THE CAR. WE WERE ARRESTED BY THE POLICE THEY FOUND [illegible]

AFFIDAVIT

United States of America
Eastern District of NEW YORK

File No. _____

I, REGINALDO LOZANO, stated that I have been advised by SA MARQUEZ, of the United States Secret Service, that under the provisions of the Constitution I have certain rights: The absolute right to remain silent, and that anything I say can be used against me in court of law or any other proceedings; that I have the right to consult with an attorney before answering any questions or making any statements, and that if I cannot afford an attorney and want one, that one can be appointed for me before I say anything; and if I decide to make any statements now, without an attorney present, I have the right to stop the questioning at any time.

Knowing and understanding these rights I hereby make the following statement:

ON 10/31/75 I WAS APPROACHED by CACERES COSME who told ME THAT HE HAD SOME COUNTERFEIT bills THAT HE HAD found, AND THAT HE WANTED ME TO help him PASS THE bills AT VARIOUS PLACES THAT NIGHT I KNEW THAT THESE bills WERE COUNTERFEIT but I passed THREE OR four of THEM ANYWAY. I REMEMBER SPECIFICALLY PASSING ONE of the bills AT A bakery LOCATED AT 32-19 Broadway, ASTORIA, N.Y. This WAS ONE of THE LAST places WE WENT before WE WERE picked up by THE police.

I have read the foregoing statement consisting of 1 pages. I fully understand this statement and it is true and correct to the best of my knowledge. I have made the corrections shown.

I make this statement freely and voluntarily, without any threats, rewards or promises of immunity in return for it.

Subscribed and sworn to before me this 1st day of Nov., 1975 in the SAIC Postal Office

Reginaldo Lozano

Witness D Marquez

Special Agent.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

JOANNE BRACCO being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 10th day of February 19 77 he served a copy of the within

Brief and Appendix for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Benjamin A. Demos, Esq
16 Court Street
Brooklyn, N.Y. 11241

Bob A. Kramer, Esq.
201 W. 72nd St
New York, N.Y. 10023

William J. Gallagher Esq.
Legal Aid Society
Fed. Defender Services Union
509 US Court House Foley Sq.
New York, N.Y. 10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Joanne Bracco

Sworn to before me this

10th day of February 19 77

Carolyn N. Johnson

CAROLYN N. JOHNSON
NOTARY PUBLIC, State of New York
No. 41-4618219
Qualified in Queens County
Term Expires March 30, 19 77